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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

DETROIT AUTO AUCTION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

What is the proper test to determine whether statements made by a union agent during the period just prior to a union representation election concerning strike-related benefits are promises which are violative of the National Labor Relations Act?

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Sixth Circuit were the National Labor Relations Board and Detroit Auto Auction, Inc.[1]

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[1] Petitioner, ADT Automotive, Inc., d/b/a Detroit Auto Auction, Inc., is an indirect subsidiary of Tyco International Limited.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
A. PROCEDURE BELOW	3
B. THE FACTS	5
C. THE SIXTH CIRCUIT COURT DECISION	7
REASONS FOR GRANTING THE WRIT	7
I. THE ELECTION MUST BE SET ASIDE BECAUSE OF THE UNION'S PRE-ELECTION PROMISES	8

II. THE PROMISES WERE VOTE-BUYING PROMISES, NOT PRIVILEGED CAMPAIGN PROMISES 16

III. THE BENEFITS PROMISED BY THE UNION CANNOT BE EXCUSED AS FUTURE BENEFITS NORMALLY ACHIEVED IN COLLECTIVE BARGAINING . . . 24

IV. THE SIXTH CIRCUIT'S DECISION HAS CREATED A DOUBLE STANDARD ON PRE-ELECTION PROMISES . . . 27

CONCLUSION 30

TABLE OF AUTHORITIES

United States Supreme Court

NLRB v. Borg-Warner Co.,
356 U.S. 342, 349-350
(1957) 26

NLRB v. Gissel Packing Co.,
395 U.S. 575, 618
(1969) 8, 13-14

NLRB v. Savair Mfg. Co.,
414 U.S. 270, 277
(1973) 18-19

United States Court of Appeals

Contech Div. SPX Corp. v. NLRB,
164 F.3d 297, 307
(6th Cir. 1998) 11-12

Freund Baking Co. v. NLRB,
165 F.3d 928, 931
(D.C. Cir. 1999) 8

Home Town Foods, Inc. v. NLRB,
416 F.2d 392, 396-397 n. 9
(5th Cir. 1969) 29

NLRB v. Arrow Molded Plastics, Inc.,
653 F.2d 280, 283 n. 3
(6th Cir. 1981) 14

NLRB v. Gulf States Canners, Inc.,
585 F.2d 757, 759
(6th Cir. 1978), *cert denied*
452 U.S. 906 (1981) 20

NLRB v. L & J Equipment Co.,
745 F.2d 224, 231
(3rd Cir. 1984),
on remand 278 NLRB 485
(3rd Cir. 1986) 9

NLRB v. Okun Bros. Shore Store, Inc.,
825 F.2d 102, 107
(6th Cir. 1987), *cert. denied*,
485 U.S. 935 (1988) 9

Plastic Masters, Inc. v. NLRB,
512 F.2d 449, 450
(6th Cir. 1975) 20

Van Dorn Plastic Mach. Co. v. NLRB,
736 F.2d 343, 348
(6th Cir. 1984) 11-12

National Labor Relations Board

Alyeska Pipeline Serv. Co.,
261 NLRB 125, 127
(1982) 12-13, 17-18

Apria Healthcare Group, Inc.,
1999 NLRB LEXIS 577 *37
(August 12, 1999) 10

Borden, Inc., 308 NLRB 113,
129 (1992), *enf'd*
Borden, Inc. v. NLRB,
19 F.3d 502 (10th Cir. 1994),
cert. denied 513 U.S. 927
(1994) 27

Briarcliff Pavilion, 260 NLRB 1374,
1377 (1982) 27

Broward County Health Corp.,
320 NLRB 212 (1995) 21

Calvine Cotton Mills, Inc.,
98 NLRB 843, 847 (1952) 22

Dart Container, 277 NLRB 1369,
1370 (1985) 25

Fetzer Broadcasting Co.,
227 NLRB 1377, 1387 (1977) . . . 25

Gulf States Canners, Inc.,
242 NLRB 1326, 1327 (1979),
enf'd 634 F.2d 215
(5th Cir. 1981), *cert denied*
452 U.S. 906 (1981) 21

Hallandale Rehabilitation and Convalescent Center, 313 NLRB 835, 837 n. 6 (1994) 12

Mailing Services, Inc., 293 NLRB 565, 566 n. 3 (1989) 8, 19

Midland Nat'l Life Ins. Co., 263 NLRB 127, 133 (1982) . . . 11-13

Nordstrom, Inc., 229 NLRB 601, 609 (1977) 24

Owens-Illinois, Inc., 271 NLRB 1235 (1984) 16

Quality House of Graphics, Inc., 1999 NLRB LEXIS 521 *41 (July 22, 1999) 27

Randell Warehouse, 328 NLRB No. 153, 1999 NLRB LEXIS 528 *14, *52 (July 27, 1999) 28

Station Operators, Inc., 307 NLRB 263 n.1 (1992) 16

The Smith Co., 192 NLRB 1098, 1101 (1971) 17

VJNH, Inc., 328 NLRB No. 16, 1999 NLRB LEXIS 275 *74 (April 28, 1999) 10

Wells Aluminum Corp.,
327 NLRB No. 119, 1999 NLRB
LEXIS 59 *10 (February 11, 1999)
(*rev'd on other grounds*,
1999 U.S. App. LEXIS 17947
(6th Cir. July 22, 1999)) 9

Statutes

28 U.S.C. §1254(1) 1

29 U.S.C. §§157, 158(a)(1)
and 158(a)(5) 2

29 U.S.C. § 158(c) 14

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit entered in this case on June 17, 1999.

OPINIONS BELOW

This Petition seeks review of an unpublished decision of the United States Court of Appeals for the Sixth Circuit reported at 1999 U.S. App. LEXIS 13987 (6th Cir. June 17, 1999). It appears in Appendix A, *infra* (App. 1a-29a). The National Labor Relations Board decision is reported at 324 N.L.R.B. No. 143, 157 L.R.R.M. (BNA) 1096 (1997) and is set forth in Appendix B *infra* (App. 30a-53a). The National Labor Relations Board's Hearing Officer's report and recommendations on objections is set forth in Appendix C *infra* (App. 54a-108a).

JURISDICTION

The decision of the Court below issued on June 17, 1999. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Sections 7 and 8(a)(1), 8(a)(5) and 8(c) of the National Labor Relations Act (hereinafter referred to as "the Act"), 29 U.S.C. §§157, 158(a)(1), 158(a)(5) and 158(c) provide as follows:

> §157. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in §158(a)(3) of this title.
>
> §158 (a). It shall be an unfair labor practice for an employer--
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

§158 (c). The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

STATEMENT OF THE CASE

At issue in this case is whether a union agent's pre-election promises to provide strike-related benefits reasonably tended to interfere with the Section 7 rights of employees to freely decide whether they wanted the union as their collective bargaining representative.

A.

PROCEDURE BELOW

A union representation election was held on August 11, 1995 at Petitioner, Detroit Auto Auction, Inc. (hereinafter

referred to as "DAA"). The International Union United Automobile Aerospace and Agricultural Implement Workers of America (hereinafter referred to as "the Union" or "UAW") won the election. DAA filed timely objections to conduct affecting the outcome of the representation election with the National Labor Relations Board (hereinafter referred to as "the NLRB" or "the Board"). A hearing was conducted and an NLRB hearing officer issued a report in which she recommended that DAA's objections be overruled and that the Union be certified as the collective bargaining representative (App. 105a). DAA filed timely exceptions to the hearing officer's report. The Board adopted the hearing officer's findings and recommendations, and ordered that a certificate of representation be issued. In order to obtain judicial review of the Board's certification, DAA refused to bargain with the Union. The Union then filed an unfair labor practice charge with the Board alleging that DAA violated Sections 8(a)(5) and (1) of the National Labor Relations Act and the Regional Director for the Seventh Region of the Board issued a complaint on those charges. The General Counsel of the Board filed a motion for summary judgment. The Board granted that motion and ordered DAA to bargain with the Union. DAA sought review of the Board's

Order by filing a petition for review in the Sixth Circuit Court of Appeals. The Board filed a cross-application for enforcement of its order (App. 2a). On June 17, 1999, the United States Court of Appeals for the Sixth Circuit enforced the decision of the Board.

B.

THE FACTS

Detroit Auto Auction, Inc., which is located in Taylor, Michigan, is engaged in the business of selling, by auction, used automobiles for car manufacturers, automobile dealers and car rental companies (App. 3a). The UAW filed a petition with the National Labor Relations Board seeking to represent a group of DAA's employees (App. 3a). The Board conducted a secret-ballot election on August 11, 1995 among the employees in the petitioned-for unit (App. 3a). A majority of the employees cast their votes in the Union's favor (App. 3a). Objecting to the election, DAA claimed that the Union engaged in conduct that tainted the election results (App. 4a).

The objection at issue in this petition concerns a Union agent's pre-election promises to employees. The Company introduced three documents into evidence which resembled retail store

coupons (App. 7a). The Union organizer's notarized signature appeared on the face of each coupon (App. 108a-110a). [The Union organizer admitted being a paid agent of the UAW and acknowledged signing the three documents (App. 108a-110a). The coupons were distributed by the Union to employees just prior to the representation election (App. 3a and 4a).]

The first coupon stated, "I promise and guarantee that you will not go on strike if 2/3 of the workers at Detroit Auto Auction vote not to strike. NO ONE FROM THE UAW WILL FORCE YOU TO STRIKE" (App. 108a). The second coupon stated, "I promise and guarantee that if a majority of the workers vote to strike (2/3) you will receive $150 a week from the strike fund. Whether or not you've ever paid dues" (App. 109a). The third coupon stated, "I promise and guarantee to give you permission, if requested, to cross the union picket line and continue to work while other union members are on strike without being subjected to pressure, intimidation or union fines" (App. 110a). The following was written on the reverse side of each of the coupons:

TO ALL EMPLOYEES:

TO PROTECT YOURSELF AGAINST FALSE PROMISES BY SOME UNION BOSSES AND

"UNION PUSHERS," WE SUGGEST YOU GET CERTAIN UNION PROMISES GUARANTEED IN WRITING. ASK THE UNION BOSS OR UNION PUSHER TO SIGN AND DATE EACH OF THE ENCLOSED UNION GUARANTEE CERTIFICATES. HAVE IT NOTARIZED TO BE PROTECTED (App. 108a-110a).

C.

THE SIXTH CIRCUIT COURT DECISION

In its decision the Court of Appeals for the Sixth Circuit concluded that "[t]he NLRB correctly determined that the coupons were campaign literature and not a vote-buying device" (App. 19a).

REASONS FOR GRANTING THE WRIT

The Sixth Circuit effectively reversed the well-established principle of the Board and its own precedent that promises to employees during the pre-election period reasonably tend to interfere with the Section 7 rights of employees to make a free, uncoerced decision on the question of whether they wish to be represented by a union. The Court has also set a double standard for reviewing conduct by a union and similar conduct by an employer. By doing so, the Court did not fulfill its obligation to enforce the law as enunciated by this

Court, the Sixth Circuit, by other Courts of Appeal and by the Board.

I.

THE ELECTION MUST BE SET ASIDE BECAUSE OF THE UNION'S PRE-ELECTION PROMISES

It is a well settled labor law principle that an employer's pre-election communications must not contain a promise of benefit. NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969). Unions, like employers, are also prohibited from promising a benefit during the pre-election period because such communications interfere with the Section 7 rights of employees to make a free, uncoerced decision on whether they wish to be represented by a union. Mailing Services, Inc., 293 NLRB 565, 566 n. 3 (1989) ("a Union . . . like an employer, [is] barred in the critical period prior to the election from conferring on potential voters a financial benefit to which they would otherwise not be entitled"); Freund Baking Co. v. NLRB, 165 F.3d 928, 931 (D.C. Cir. 1999) ("Just as the Act prohibits an employer from using threats or rewards as campaign tactics, it bars both crude and subtle forms of vote-buying on the part of the union"). The policy underlying the

prohibition against promising benefits prior to an election is "rooted in the idea that an employee's vote should be governed only by consideration of the advantages and disadvantages of unionization in his or her work environment, and not by any extraneous inducements of pecuniary value." NLRB v. L & J Equipment Co., 745 F.2d 224, 231 (3rd Cir. 1984), *on remand* 278 NLRB 485 (3rd Cir. 1986).

Although an employer's promise of benefits prior to an election is the more typical unfair labor practice claim, the Board stated just this year "that a union's . . . promise of benefits to prospective voters should be viewed just as carefully. . . ." Wells Aluminum Corp., 327 NLRB No. 119, 1999 NLRB LEXIS 59 *10 (February 11, 1999) (*rev'd on other grounds*, 1999 U.S. App. LEXIS 17947 (6th Cir., July 22, 1999)) (App. 123a). Not long ago the Sixth Circuit recognized that pre-election promises are a particularly sensitive issue. *See* NLRB v. Okun Bros. Shore Store, Inc., 825 F.2d 102, 107 (6th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988) ("Both the Board and the Courts have been particularly sensitive to . . . *promises* made by either labor or management in efforts to coerce employees into voting one way or another in a union certification election"). (Emphasis added.) In its

opinion below, however, the Sixth Circuit stated that "campaign promises are not reviewed or regulated by a public agency or the courts" (App. 15a). According to the Sixth Circuit, the Board and the Courts have taken a "much different view" of campaign promises as compared with granting benefits.

The Sixth Circuit is plainly wrong. Just five months ago in VJNH, Inc., 328 NLRB No. 16, 1999 NLRB LEXIS 275 *74 (April 28, 1999) (App. 424-425a), the Board stated that granting benefits and promising benefits during the pre-election period both violate the Act to the same degree:

> It has long been recognized that the bestowal of benefits during an organizational campaign can be as coercive as a threat. It follows that, in addition to the actual grant of benefits, the promise of improved benefits in order to discourage employees from selecting the union is equally violative of the Act.

See also Apria Healthcare Group, Inc., 1999 NLRB LEXIS 577, *37 (August 12, 1999) ("Like the vice inherent in an actual conferral of benefits, a promise of benefits, made in response to

initiation of an organizing campaign or in anticipation of a representation election, violates the Act") (App. 171a).

Although the Sixth Circuit cited three cases regarding the "different view" purportedly placed on campaign promises, not one of the cases concerned pre-election promises. Rather, each case addressed *misleading* campaign propaganda, not pre-election promises. Midland Nat'l Life Ins. Co., 263 NLRB 127, 133 (1982)(campaign material in question was an employer handout on the union's bargaining record at three other employers) ("we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements"); Van Dorn Plastic Mach. Co. v. NLRB, 736 F.2d 343, 348 (6th Cir. 1984) (union flyer to employees contained inaccurate information concerning wage rates negotiated by the union at another employer) (Sixth Circuit upheld the Board's decision on the issue of misrepresentation); Contech Div. SPX Corp. v. NLRB, 164 F.3d 297, 307 (6th Cir. 1998) (union letters to employees concerning, *inter alia*, alleged Company instigated rumors regarding the plant moving and the loss of customers if the union won the election, which were misrepresentations) ("The Board correctly found that the alleged UAW misrepresenta-

tions were not so egregious as to justify setting aside the second election"). Midland Nat'l Life Ins. Co., Van Dorn Plastic Mach. Co. and Contech Div. SPX Corp. do not apply to the promises at issue here because there was no claim of misrepresentations. The instant case is purely a matter of promises of benefit by the Union. *See* Hallandale Rehabilitation and Convalescent Center, 313 NLRB 835, 837 n. 6 (1994) ("as there is no allegation that the statement was a misrepresentation, issues addressed by Midland are not presented").

In Alyeska Pipeline Serv. Co., 261 NLRB 125, 127 (1982), the Board set aside an election where employees were told that being a member of the union would give them a "definite advantage" in obtaining employment. The hearing officer in Alyeska Pipeline characterized the union's remark as permissible "puffery," but on review, the Board criticized the hearing officer's report, stating that he "mistakenly considered the statements only from the standpoint of misrepresentation. [W]e view them to be more akin to an employer's promise to grant benefits if the Union loses, or an Employer's threat of plant closure if the Union wins." Alyeska Pipeline Serv. Co., 261 NLRB at 127.

The Sixth Circuit made the same mistake here as the hearing officer did in Alyeska Pipeline and incorrectly interpreted the point of the election objection. The Union unquestionably made promises to employees—each of the coupons begins with, "I promise." Yet, the Sixth Circuit overlooked this plain fact and, citing Midland National Life Ins. Co., 263 NLRB 127 (announcing return to Shopping Kart standard on issues of campaign propaganda), dismissed the promises as "campaign literature and not a vote-buying device" (App. 19a). As stated above, Midland is not applicable because there was no claim whatsoever that the coupons were misrepresentations. The coupons contained clear *promises* of future benefits to the electorate, guaranteed by the Union. Even the Board stated in Midland, that notwithstanding its return to the Shopping Kart doctrine, it "would continue to protect against *other campaign conduct, such as . . . promises*, or the like, which interferes with employee free choice." (Emphasis added.) Midland, 263 NLRB at 133.

The Sixth Circuit's erroneous analysis continued when it stated that a campaign promise "is a form of protected speech" (App. 16a). This is not true. This Court explained over thirty years ago in Gissel Packing Co., *supra*, that the First Amendment right to free speech

is implemented through Section 8(c) of the Act and, according to that provision, "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, *so long as the communications do not contain a threat of reprisal or force or promise of benefit.*'" (Emphasis added.) Gissel Packing Co., 395 U.S. at 617-618, *quoting* 29 U.S.C. § 158(c). Even the Sixth Circuit recognized that the right to free speech is not absolute and that "[t]hreats of reprisal or force or *promise of benefit* do not constitute protected speech within the meaning of section 8(c) of the Act." (Emphasis added.) NLRB v. Arrow Molded Plastics, Inc., 653 F.2d 280, 283 n. 3 (6th Cir. 1981).

The promises contained in the coupons were not protected speech. The undisputed evidence proves that the lead organizer for the Union made three written promises of future benefits to employees just prior to the representation election: (1) in the event of a strike, the Union would pay employees $150.00 per week from its strike fund; (2) the Union would not force employees to strike without two-thirds of all the employees in the unit voting to strike; and (3) that employees would be permitted to cross a picket line without pressure,

intimidation or Union fines (App. 7a-8a). The subject of strikes is an important issue for the voting employees which they must weigh in deciding whether to vote for the Union. The possibility of a strike means the possibility of being out of work without pay. It was a critical issue during the pre-election campaign at DAA.

The Union's three promises, made just before the vote, effectively removed the subject of strikes as an issue for employees. The Union bought pro-union votes by nullifying the "strike contingency" by promising money to employees -- weekly income from the Union if the employees engaged in a strike or weekly income from the Employer if the employees chose to work during the course of a strike because the Union promised to give the employees permission to work without reprisal. Additionally, the Union promised to make a strike a remote possibility by promising to "raise the bar" by which a strike could be authorized. The Union promised that a strike would only be authorized by a two-thirds vote by all DAA workers, not just two-thirds of those voting.

II.

THE PROMISES WERE VOTE-BUYING PROMISES, NOT PRIVILEGED CAMPAIGN PROMISES

The Sixth Circuit opined further that the Union's promises constituted campaign literature, not vote-buying promises (App. 19a). The Board, however, has characterized union *campaign* promises as those promises which can only be fulfilled by obtaining the employer's agreement through the collective bargaining process. *See* Station Operators, Inc., 307 NLRB 263 n.1 (1992) (a union's promise of benefits "that allegedly could be obtained from collective bargaining . . . do not exceed the bounds of privileged campaign propaganda"); Owens-Illinois, Inc., 271 NLRB 1235 (1984). The Board explained long ago that these union promises are privileged campaign propaganda:

> Employees are generally able to understand that a union cannot obtain benefits automatically by winning an election but must seek to achieve them through collective bargaining. Union promises of the type involved herein are easily recognized by employees to be dependent on

> contingencies beyond the Union's control and do not carry with them the same degree of finality as if uttered by an employer who has it within his power to implement promises or benefits. The Smith Co., 192 NLRB 1098, 1101 (1971).

In contrast to campaign promises, promises that can be fulfilled without the employer's agreement are considered coercive, vote-buying promises because they have a reasonable tendency to influence the outcome of an election. As the Board found in Alyeska Pipeline Service Co., a union's promise that as a member of the union, employees would have a definite advantage in securing a job was objectionable because the union had the power to effectuate the promise. The Board reasoned that the union controlled all access to construction jobs and, as a result, the promises "were not similar to those nonviolative union statements that employees understand cannot be automatically delivered but must be achieved through collective bargaining." Alyeska Pipeline Service Co., 261 NLRB at 127 n. 4.

The three promises by the Union are not campaign propaganda because the promised-for benefits were entirely within the Union's control and were not

dependent upon obtaining DAA's agreement. The promised-for benefits here, like the promise in Alyeska Pipeline, are not dependent upon the contingencies inherent in collective bargaining. Whether to issue work permission slips during strikes, whether to pay strike benefits and the circumstances under which a strike action can be taken against an employer are all matters exclusively within the control of the Union.

This Court found in NLRB v. Savair Mfg. Co., 414 U.S. 270, 277 (1973), that a union's promise to waive an initiation fee (a matter within the union's control), for those employees who signed a recognition slip before the election was coercive because it permitted "the union to buy endorsements and paint a false portrait of employee support during its election campaign." Here, the Union was not simply buying endorsements, it bought votes in exchange for its promise to provide strike-related benefits, e.g., employees would receive $150 per week during a strike. As this Court recognized in Savair, "[a]n employer who promises to increase the fringe benefits by $10 for each employee who votes against the union, if the union loses the election, would cross the forbidden line under our decisions." Savair Mfg. Co., 414 U.S. at 278. The three promises here also crossed the forbidden line because

the Union promised, prior to the election, benefits to the employees in the voting unit. Obviously, these benefits would only be available to the employees if the Union won the election.

After ignoring the importance of this Court's Savair decision and Board precedent regarding union campaign promises, the Sixth Circuit defined vote-buying as occurring "*only* when a union promises an immediate economic benefit that will accrue only if employees vote for union representation" (emphasis added) (App. 17a). Significantly, the Court failed to cite any authority in support of this definition of vote buying. The reason for its failure to cite a case is the plain fact that there is no legal support for the Court's restrictive definition of vote buying. The Board has held that a promise can be considered "vote-buying" even though the promise is not expressly conditioned on the support of a union. As the Board recognized in Mailing Services Inc., "[a]lthough the invitation to employees to take the medical tests required no explicit showing of union support, . . . it nevertheless was made available to employees during the election campaign, with a clear indication that this benefit would remain only contingent on the selection of the Union." Mailing Services Inc., 293 NLRB at 566 n. 3.

The promises here were not expressly conditioned on the employee's support for the Union, but it defies logic to conclude that the promises were made for any other purpose than to cause the employees to elect the Union as their representative. Clearly these promises were made to "buy" the employees support for the Union.

Whether a promise is coercive or "vote-buying" is not judged by the presence of an express intention that employees favor a party to the election. As the Sixth Circuit recognized nearly twenty-five years ago: "[I]n our opinion the intent or absence of intent on the part of the Union to influence the employees' votes by the overpayments is not a controlling factor." Plastic Masters, Inc. v. NLRB, 512 F.2d 449, 450 (6th Cir. 1975). The Sixth Circuit later explained:

> The effects of an act intended to influence an election may be so minimal that the outcome remains unaffected. Conversely an unintentional act may have such a deleterious effect on the conduct of an election that the result does not reflect the voters' free will. NLRB v. Gulf States Canners, Inc., 585 F.2d 757, 759 (6th Cir. 1978)

cert. denied 452 U.S. 906 (1981).

The Board has long subscribed to this objective standard—"whether the challenged conduct has a reasonable tendency to influence the election outcome." Broward County Health Corp., 320 NLRB 212 (1995), *citing* Gulf States Canners, Inc., 242 NLRB 1326, 1327 (1979), *enf'd* 634 F.2d 215 (5th Cir. 1981), *cert. denied* 452 U.S. 906 (1981) ("In evaluating whether or not certain campaign tactics constitute objectionable conduct, the Board has generally applied an objective standard in accord with the 'tendency-to-influence test' followed by the courts"). The three promises here had a reasonable tendency to influence the outcome of the election.

The Union's three promises were clearly coercive, vote-buying promises. The Union promised in writing to pay employees $150 per week in strike benefits regardless of whether they paid dues. Although the Union Constitution states that employees will receive financial assistance during a strike, it does not specify what form the financial assistance will take or the amount of such financial assistance (Article 12, Section 13 and Article 50, Section 1 in App. 110b-110e). Thus, the Union Constitution grants the Union wide discretion in terms of providing direct

financial assistance to its members. This promise is akin to an unlawful promise by an employer that a person on layoff status would be rehired in exchange for a vote against a union. Calvine Cotton Mills, Inc., 98 NLRB 843, 847 (1952). The same considerations that prohibit an employer from making this kind of promise also apply to the Union.

Another objectionable promise made by the Union is that any employee would be given permission to cross a Union picket line without being pressured, intimidated or fined. Again, the Union has enormous discretionary power and exploits it by promising the members of the voting unit that they need not worry about the Union's most important economic weapon – a strike – because the Union will allow them to cross a picket line and work with impunity, with no fear of reprisal from the Union. In other words, the Union is unlawfully promising the employees that they can have a union with no threat of having to walk a picket line. Furthermore, the Union is unlawfully promising employees that they will have no problem from the Union if they choose to cross a picket line.

The history of the labor movement in this country is replete with examples of the importance of what this promise means. One need only observe specifi-

cally the UAW's history spanning the short period between labor disputes at the Kohler Company in Wisconsin in the 1950's to Caterpillar, Inc. in the 1990's for proof that a union member does not cross a normal picket line with impunity from the union. Significantly, the employees in this case were well aware of how unions do not tolerate employees crossing a picket line. Strikes are usually not pleasant events, but the union has the power to control the tenor of such events. Yet, the Union, in this case, promised impunity so that it could buy votes.

Lastly, the Union promised a different strike authorization procedure from the primary procedures set forth in the Union Constitution (App. 110c-110d). The Union promised that a strike would not occur unless two-thirds of all the DAA workers in the unit voted to strike. The Union Constitution, however, allows for a smaller percentage of the employees to decide the strike issue by providing that only two-thirds of the members in good standing *who actually vote* can decide to go on strike (App. 110c-110d). The Union Constitution does provide for the use of a different procedure by a Local Union (Article 50, Section 1(b) of App. 110c and 110d). Thus, the Union may exercise its discretion in deciding whether to make

good on this promise as well. The promise is that a strike is less likely because the Union will implement tougher rules for a strike at DAA if the employees vote the Union in. The three Union promises bestowed tangible benefits to the electorate and had a reasonable tendency to coerce employees.

III.

THE BENEFITS PROMISED BY THE UNION CANNOT BE EXCUSED AS FUTURE BENEFITS NORMALLY ACHIEVED IN COLLECTIVE BARGAINING

The good faith bargaining requirement under the Act extends only to mandatory subjects of bargaining. The Board has defined mandatory subjects of bargaining as "wages, hours, and other terms and conditions of employment," as set forth in Section 8(d) of the Act. Nordstrom, Inc., 229 NLRB 601,609 (1977). The touchstone is whether the proposed clause sets a term or condition of employment or regulates the relation between the employer and its employees." Nordstrom, Inc., 229 NLRB at 609. The Sixth Circuit erroneously dismissed the Union's three promises on the ground that the promises "involved the type of *future benefits* that unions normally seek to obtain for their members" (emphasis

added) (App. 17a).[2] The Union's promises cannot be characterized as future benefits which may be attained in collective bargaining because they are matters peculiar to the internal administration of the Union and beyond the scope of bargaining. *See, e.g.* Fetzer Broadcasting Co., 227 NLRB 1377, 1387 (1977) (company proposal that prohibited union from interfering with employees who engaged in activity against the union concerned "internal union affairs and covered a permissive bargaining subject").

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[2] Because the benefits promised amounted to a future benefit, not an *existing* benefit, the communications cannot be characterized as a benign promise to extend an existing benefit to new members. *See* Dart Container, 277 NLRB 1369, 1370 (1985) ("Unlike promising a newly created benefit to all employees . . ., promising to extend an existing benefit to new union members does not suggest to employees that their votes are being purchased"). Practically speaking, these so-called "future benefits" are *never* sought by unions through collective bargaining. It is unimaginable to think that a union would seek, as a *benefit* for its members, work permission slips during strikes, weekly strike benefits and a special procedure for a strike vote.

For example, the Union's promise regarding a two-third's vote for a strike authorization is similar to an employer proposal held by this Court over 40 years ago to be a nonmandatory subject of bargaining. NLRB v. Borg-Warner Co., 356 U.S. 342, 349-350 (1957). In Borg-Warner, an employer proposed a ballot clause which required a pre-strike vote among union and non-union employees on whether to accept or reject the employer's last offer. The proposal also provided that if a majority of the employees rejected the offer, the employer would be given 72 hours to submit a new proposal prior to any strike. This Court found that the ballot proposal was not a mandatory topic of bargaining because "[i]t relates only to the procedure to be followed by the employees among themselves before their representative may call a strike or refuse a final offer. It settles no term or condition of employment—it merely calls for an advisory vote of the employees. . . . The 'ballot' clause . . . deals only with relations between the employees and their union." Borg-Warner Co., 356 U.S. at 349-350. Similarly, the Union's promises on strike benefits and work permission slips during strikes involve internal Union matters and thus do not involve a mandatory bargaining subject. The proposals do not address any issue as between DAA and the

employees. *See* Quality House of Graphics, Inc., 1999 NLRB LEXIS 521, *41 (July 22, 1999) ("employer violated Section 8(a)(5) of the Act by insisting as a condition of reaching a collective-bargaining agreement, that the union withdraw fines it had imposed against members who crossed a picket line and returned to work during a strike"); Borden, Inc., 308 NLRB 113, 129 (1992), *enf'd* Borden, Inc. v. NLRB, 19 F.3d 502 (10th Cir. 1994), *cert. denied* 513 U.S. 927 (1994) ("a union submission of contracts for ratification by its members is a matter of internal union business, a nonmandatory subject of bargaining and a matter of legitimate concern to the Union and its members only"); Briarcliff Pavilion, 260 NLRB 1374, 1377 (1982) (employer's proposal regarding union initiation fees and dues "is a nonmandatory subject of bargaining in that it has no relationship to employees' terms and conditions of employment and involves only internal union affairs").

IV.

THE SIXTH CIRCUIT'S DECISION HAS CREATED A DOUBLE STANDARD ON PRE-ELECTION PROMISES

If left to stand, the Sixth Circuit's decision creates a double

standard that condemns pre-election promises by employers, but characterizes union pre-election promises as harmless campaign propaganda. The Board is no stranger to double standards as between employer and union conduct. In a recent decision, Randell Warehouse, 328 NLRB No. 153, 1999 NLRB LEXIS 528 *14, *52 (July 27, 1999) (App. 361a), the Board overruled a ten-year old decision and held that employer videotaping of employees engaged in protected activities has a tendency to intimidate, but that the same conduct by unions is a lawful "means by which unions can determine the identity and leanings of employees and carry out their legitimate objective of attaining majority support" (App. 375a-376a).

A Board member was very critical of the double standard reflected in the Board's decision. Member Brame stated that "the Board must treat like conduct identically" (App. 386a). Randell Warehouse, 1999 NLRB LEXIS 528 (July 27, 1999) (*Board Member J. Robert Brame III concurring in the result*). According to Member Brame:

> [N]either reality, law, nor logic can support the view that a union is "merely an outsider seeking entrance to the plant," which, in contrast to the

> employer, lacks the ability to coerce employees and hinder their exercise of rights protected by the Act. Both parties possess the potential for exercising some degree of power over employees, albeit in different forms. The majority, however, has articulated no reasoned basis for creating a "double standard" that presumptively condemns photographing of employees taking part in protected concerted activity by an employer, but not the same conduct undertaken by a union. 1999 NLRB LEXIS 528.

The United States Court of Appeals for the Fifth Circuit long ago espoused its view against the Board's use of a double standard, one for union conduct and one for employer conduct. "It would seem to us, however, that the Board should apply a *single* standard against which it will measure the campaign conduct of *all* parties who might have interfered with employee free choice. . . ." (Emphasis in original.) Home Town Foods, Inc. v. NLRB, 416 F.2d 392, 396-397 n. 9 (5th Cir. 1969).

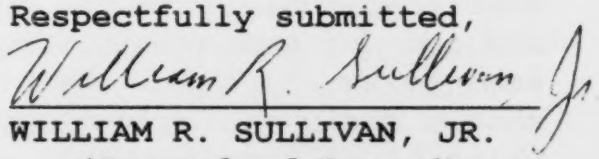
The three promises made by the Union here should be judged under the "tendency-to-influence" test that applies

to employers and not as benign campaign propaganda. Significantly there does not appear to be any reported decision where an employer's pre-election promise to grant benefits to employees in a representation election was found to be campaign propaganda. Pre-election promises, whether made by unions or employers, ought to be held to the same legal standard.

CONCLUSION

The election should be rerun because the Union's promises had a reasonable tendency to interfere with the laboratory conditions necessary for employees to freely cast their votes. For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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September 14, 1999

A P P E N D I C E S

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

1999 U.S. App. LEXIS 13987

Before

Hon. RYAN, Circuit Judge
Hon. GILMAN, Circuit Judge
Hon. SARGUS, District Judge*

Nos. 97-6487 & 98-5096	) On Petition
	) For Review
DETROIT AUTO AUCTION,	) And Cross-
INC.,	) Application
	) For Enforce-
Petitioner,	) ment Of An
Cross-Respondent,	) Order Of The
	) National Labor
and	) Relations
	) Board.
	)
NATIONAL LABOR RELATIONS	) No. 7-CA-39942
BOARD,	)
	)
Respondent,	)
Cross-Petitioner.	)

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* Honorable Edmund A. Sargus, Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

OPINION

Petitioner/Cross-Respondent, Detroit Auto Auction, Inc. ("Detroit Auto") petitions for review of the decision rendered by Respondent/Cross-Petitioner, the National Labor Relations Board ("NLRB" or the "Board") on October 31, 1997. In its Order, the NLRB directed Detroit Auto to bargain with the International Union United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW"). In turn, the NLRB seeks enforcement of its order. For the reasons that follow, the Petition for Review of Detroit Auto is denied; the NLRB's Petition for Enforcement is granted.

I.

Detroit Auto is engaged in the business of remarketing automobiles through auction sales. On June 30, 1995, the UAW filed a representation petition with the Board seeking certification as the exclusive bargaining [*3] agent of the drivers, mechanics and certain other employees of Detroit Auto.

On August 11, 1995, in accordance with a stipulated agreement, the Board conducted a secret ballot election. Seventy-nine (79) votes were cast in favor of Union representation, while forty-five (45) employees voted against the Union. Eleven (11) votes were

challenged, a number which could not effect the outcome of the election.

Thereafter, Detroit Auto filed objections to the election. The employer alleged that the UAW made an unlawful promise of benefit to improperly influence employees; that threats were made to employees which prevented a free and fair election; and that improper electioneering occurred during the actual voting. Following a full evidentiary hearing, a Hearing Officer rejected all of the objections to the election filed by Detroit Auto.

The Board subsequently adopted the Hearing Officer's findings and recommendation, and certified the UAW as

the exclusive bargaining agent on behalf of the employees of Detroit Auto. The employer has refused to recognize the election results or to bargain with the UAW. Consequently, the Board issued an Order on October 31, 1997 that Detroit Auto cease [*4] and desist from violations of 29 U.S.C. § 158(a)(1) and (5) by refusing to bargain with the UAW. Detroit Auto has refused to bargain with the UAW based upon the employer's claim that the election was invalid. Resolution of both the election issues and the unfair labor practice charge turns on the conduct of the election.

II.

Detroit Auto seeks to invalidate the election on three grounds. First, the Petitioner asserts that the Union unlawfully made certain promises of benefits which prevented a fair election. Second, Detroit Auto claims that threats were made against certain employees opposing unionization which created an atmosphere that made a fair election impossible. Finally, the petitioner alleges that loud and distracting conversations occurring during actual voting prevented employees from freely casting ballots.

The Board's fact finding must be affirmed on appeal if supported by

"substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); *NLRB v. Michigan Conference of Teamsters Welfare Fund*, 13 F.3d 911 (6th Cir. 1993). Further, "a party who seeks to overturn the results of a representation election has the burden to show that the election was [*5] not fairly conducted." *NLRB v. Bostik Div.*, 517 F.2d 971 (6th Cir. 1975).

A. Union Campaign Coupons

Detroit Auto's first challenge to the election is based upon three coupons distributed prior to the vote. The coupons, resembling retail store discount certificates, made three promises on behalf of the Union. The first promised

that no strike would be called without the approval of two-thirds of Detroit Auto's employees. The second promised that, in the event of a strike, strikers would receive $150 per week in strike benefits. The third coupon stated that, again in the event of a strike, any employee could request and obtain permission to cross a picket line and continue to work without pressure or intimidation.

The case law defining the scope and standards of review in a challenge to a certification election begins with the Supreme Court's opinion in *NLRB v. Savair*, 414 U.S. 270, 38 L.Ed.2d 495, 94 S.Ct. 495 (1973). There, the Court first

noted that the Board, under 29 U.S.C. § 159(c)(1), has a duty "to insure the fair and free choice of bargaining representatives by employees." *Id.* at 276 (quoting *NLRB v. Tower Co.*, 329 U.S. 324, 330 91 L. [*6] Ed. 322, 67 S.Ct. 324 (1946)).

The case law has since developed along lines not dissimilar from standards applicable to campaigns for public office. In general, both the employer and union organizers are able to engage in rigorous campaign activities, including pamphleteering, solicitation, etc. Neither labor nor management, however, may engage in vote-buying.

For example, during the period between the filing of a union certification petition and the conducting of an election, an employer may not unilaterally grant a benefit of employment without a bona fide business justification. *Torbitt & Castleman, Inc. v. NLRB*, 123 F.3d 899 (6th Cir. 1997). Conversely, an employer may not cancel a planned pay increase in response to the filing of a union certification petition. *GAF v. NLRB*, 488 F.2d 306 (2nd Cir. 1973).

Restrictions also have been developed as to union conduct during an organizing campaign. In *Savair*, a union offered a waiver of the $10 initiation

fee to any employee who agreed to sign a pre-election recognition slip in support of union certification. The Court described this conduct as votes being "bought and sold." *Savair*, 414 U.S. at 277. The Court concluded [*7] that such activities were sufficient to invalidate the representation election.

Similarly, in *Plastic Masters, Inc. v. NLRB*, 512 F.2d 449 (6th Cir. 1975), this Court invalidated an election based upon certain payments by the union to employee-members of the bargaining union. While a claim was made that such payments were simply reimbursements for expenses and wage-loss resulting from campaign activities, the payments exceeded any

out-of-pocket losses, including wages, incurred by the employees. The payments represented an unlawful union "inducement" which improperly influenced the election. *Id.* at 451.

More recently, in *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578 (6th Cir. 1995), the Teamsters' union held a rally only days before an election. The president of the union announced that the organization had, that day, initiated a lawsuit against the employer and estimated that $35,000.00 was due to each employee of the company. The Court viewed the union's lawsuit to be tantamount to a gift of free legal services provided on the eve of an

election. The suit could not be concluded prior to the election. The employees could vote for the union solely for the purpose of maintaining [*8] the lawsuit and not for the recognition of the union as their exclusive bargaining agent.

In *Freund Baking Co. v. NLRB*, 165 F.3d 928, (D.C. Cir. 1999), the court found a similar eleventh-hour-lawsuit filed by a union on behalf of employees about to vote on whether to unionize to be improper and sufficient to invalidate the election. The court held:

> The [National Labor Relations] Act is studiously neutral upon the merits of unionization..., its mandate to the Board is that elections accurately ascertain employees sentiment

> on the question of representation. As both the Board and the courts have long recognized, this goal cannot be achieved when either the employer or the union engages in tactics that induce workers to cast their votes upon grounds other than the advantages or disadvantages of union representation.

Id. at 931 (citations omitted).

While prohibiting the giving or withholding of economic benefits in exchange for or in an attempt to influence votes, the NLRB and the courts have taken a much different view as to campaign promises. E.g., *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982); *Van Dorn Plastic Mach. Co. v. NLRB*, 736 F.2d 343 [*9] (6th Cir. 1984). Recently, this Court held in *Contech Div., SPX*

Corp. v. NLRB, 164 F.3d 297 (6th Cir. 1998).

To the extent that the UAW letters might be regarded as "propaganda," such is common in almost all representation elections. The employees were free to evaluate the letters as such, and [the employer] was free to respond in kind. If absolute objectiveness and pristine conduct were required in order to sustain an election, then virtually none would survive the rough and tumble of labor-management contentiousness.

Id. at 307.

As in elections for public office, campaign promises are not reviewed or regulated by a public agency or the

courts. Consistent with the protections of the First Amendment, electioning is a form of protected speech. *Contech*, 164 F.3d at 308. Conversely, the whole notion of a free election is defeated if either side in a campaign buys votes through threats or promises.

The Petitioner argues that the coupons distributed by the Union expressly conveyed "a promise of future financial benefit." (Petitioner's Final Reply Brief, p. 5). The Petitioner claims that the NLRB mistakenly analyzed the coupons as campaign literature, which [*10] is subject to far less, if any, scrutiny, as opposed to economic

promises, which would constitute vote-buying.

The NLRB correctly points out that impermissible vote-buying occurs only when a union promises an immediate economic benefit that will accrue only if employees vote for union representation (NLRB Application for Enforcement, p. 30). A union is certainly free to extol the virtues of collective representation. The promises made here in the coupons distributed by the Union involved the type of future benefits that unions normally seek to obtain for their members, including heightened majorities for strike votes, strike pay for members and work permission during strikes.

Further, the benefits promised by the coupons would insure to all employees includable in the bargaining unit, the benefits were not limited to those who voted in favor of the Union. The promises were clearly attributable to the Union and could be evaluated by an employee as identifiable campaign literature. Finally, nothing in the coupons threatened, directly or indirectly, that an employee would suffer any kind of economic loss if the Union was defeated.

The distinction between legitimate campaign promises [*11] and illegitimate vote-buying may at times be subtle and problematic. In this case, however, the

distinction is clear. The NLRB correctly determined that the coupons were campaign literature and not a vote-buying devise. The decision as to whether the promises should be credited was correctly left to the employees of Detroit Auto.

B. Threats Against Employees

Detroit Auto claims that alleged threats against three employees, Evelyn Conrad, Shannon Hull and Natalie Sype, interfered with the employees' free exercise of choice and materially affected the results of the election. Because threats of violence may in fact prevent a free election, such conduct is never to be taken lightly. *Steak House Meat Co., Inc.*, 206 N.L.R.B. 28 (1973).

In the case of Evelyn Conrad, Detroit Auto alleges that a co-employee, Gordon Seyler, who was a member of the Union's organizing committee, made threats to Conrad. Specifically, Conrad testified before a Hearing Officer of the NLRB that Seyler threatened her by asking how she would like it if "some big bad union guy put a bomb in your purse." (JX I, p. 55).

The Hearing Officer first addressed whether Seyler was an agent of the Union. If [*12] so, any threats made by a union agent would invalidate an election if the conduct interfered with the employee's free and uncoerced choice. *Baja's Place, Inc.*, 268 N.L.R.B. 868 (1984). In

contrast, threats made by a co-worker, who is not a union agent, are analyzed under a quite different standard which questions "whether the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 N.L.R.B. 802, 803 (1984).

The Hearing Officer resolved conflicting evidence concerning Seyler's status. While Seyler did help prepare a Union newsletter and answered questions from employees concerning the Union, a UAW organizer conducted all meetings and was the principle source of information concerning the Union. The Hearing

Officer concluded that Seyler was not a Union agent.

Perhaps more importantly, the Hearing Officer also refused to credit Conrad's version of the alleged threat made by Seyler. According to Seyler, a co-worker had been fired for leaving the facility with company property. From this, Seyler testified that he had advised many employees not to carry bags or purses in or out of work. Seyler [*13] testified that the comment he made to Conrad was in the context of warning her not to be set up. (JX I, p. 55). Other witnesses corroborated this warning.

From this, the Hearing Officer credited Seyler's view of events. Seyler was described by the Hearing Officer as "more forthright" than Conrad. This Court must defer to credibility determinations made by the Hearing Officer, who had an opportunity to observe the witnesses and their demeanor. *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). This conclusion reached by the Hearing Officer, as adopted by the NLRB, is supported by substantial evidence. Consequently, this Court need not address further whether Seyler should have been viewed as a Union agent.

Detroit Auto also claims that threats received by a Nathalie Sype

created an atmosphere of fear, preventing a free election. During her work, Sype wrote the word "No" in large chalk letters on the side of a car she was inspecting at work. The same evening, she received an anonymous call during which she was told "if you write no again, you won't be able to write." (JX I, p. 54).

The Hearing Officer concluded, and the NLRB adopted the finding, that the threat was not sufficient [*14] to create a general atmosphere of intimidation. Further, Sype had been warned by a manager of Detroit Auto not to write on the vehicles, as employees had complained that the removal of the letters caused

extra work. The conclusion that the anonymous call to Nathalie Sype did not prevent a free election is supported by substantial evidence in the record as a whole.

The final alleged threat raised by Detroit Auto involves a Shannon Hull, who also received an anonymous phone call in which the speaker stated that "if she valued Devon's [her son] life, she can vote yes or no." (JX I, p. 54). Hull's husband was a supervisor at Detroit Auto at the time she received the phone call. (JX I, p. 53, n. 4.)

The Hearing Officer viewed the threat as ambiguous, noting that the caller gave no clear indication which way

Hull should vote. While such a call is highly despicable, the caller could not be identified by Hull and the point of the threat was wholly unclear.

While threats are anathema to a free and fair election campaign, the conclusion reached by the Hearing Officer and adopted by the Board that the election itself was not conducted in a general atmosphere of fear is supported by substantial [*15] evidence.

C. Election Day Conduct

Detroit Auto also asserts that loud, prolonged noise and conversations occurring during balloting prevented a fair election. The Board has recognized that sustained electioning conducted with

prospective voters waiting in line to cast their ballots is prohibited and will require a new election. *Milchem, Inc.*, 170 N.L.R.B. 362 (1968). If the electioneering conduct, however, is not prolonged and does not involve actual representatives of labor or management, the Board looks to all attendant facts and circumstances to determine whether the electioneering "substantially impaired the exercise of free choice." *Glacier Packing Co., Inc.*, 210 N.L.R.B. 571, 573 (1974).

The Hearing Officer found that on no more than two occasions, small groups of employees gathered, clapped and chanted for less than one minute at a location

outside the polling area. Certain voters standing in line engaged in loud conversations, although no witnesses could describe the content of such conversations. (JX I, p. 57-58).

The Board, in adopting the conclusions of the Hearing Officer, correctly determined that the challenged conduct was at most de minimis, and, [*16] more importantly, no electioneering. The conclusion of the Board that election day activities did not prevent a free election is supported by substantial evidence in the record taken as a whole.

III.

Based upon the foregoing, the NLRB's Petition for Enforcement of its Decision and Order dated October 31, 1997 is GRANTED. The Petition for Review filed by Detroit Auto Auction, Inc. is DENIED.

RYAN, Circuit Judge. Concurs in the judgment only.

CONCUR BY: RYAN

APPENDIX B

Detroit Auto Auction, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, Case 7-CA-39942

October 31, 1997

DECISION AND ORDER

By Chairman Gould and Members Fox and Higgins

Pursuant to a charge filed on June 18, 1997, the General Counsel of the National Labor Relations Board issued a complaint an notice of hearing on July 23, 1997, alleging that the Respondent has violated Section 8(a)(5) and (1) of the national Labor Relations Act by refusing the Union's request to bargain and to furnish necessary and relevant information following the Union's

certification in Case 7-RC-20648. (Official notice is taken of the "record" in the representation proceeding as define din the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On August 29, 1997, the General Counsel filed a Motion for Summary Judgment. On September 3, 1997, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

Ruling on Motion for Summary Judgment

In its answer and response the Respondent admits its refusal to bargain and to furnish information, but attacks the validity of the certification on the basis of its objections to conduct alleged to have affected the results of the election in the representation proceeding. In addition, the Respondent denies that the information requested is necessary and relevant to the Union's duties as the exclusive bargaining representative of the unit.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not

offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to re-examine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

We also find that there are no factual issues warranting a hearing with respect to the Union's request for

information. The Union requested the following information from the Respondent:

1. Current list of all bargaining unit employees (working, laid off, or on any type leave of absence), including their:

   - Names, addresses, phone numbers and social security numbers;
   - Date of birth;
   - Date of hire;
   - Gender;
   - Classification;
   - Rate of Pay;
   - Classification Seniority, if any;
   - Current hours of work and/or shift.

2. The average total labor cost per hour, per employee, including all wages, overtime,

vacation, holiday, shift premiums, bonuses, medical insurance, dental insurance, vision insurance, sickness and accident insurance, long-term disability insurance, life insurance, FICA, unemployment compensation, and any other costs you have. We would like this specifying the per hour cost of each item.

3. The total hours worked by all bargaining unit employees for each of the past three years.

4. Income statements for the last three (3) full years.

5. General and administrative expenses, including details on management salaries and benefits.

6. Operating plans, budgets, forecasts or other documents dealing with projected costs and operating results.

7. A list of all your competitors, including company name, address, and whether they are unionized. Also, any wage and

benefit information you have on them.

8. A current list of all fringe benefits you are providing such as vacation, holiday, sick days, etc., and all insurance such as medical, life, AD&D, sickness and accident, vision, hearing, dental, etc., including an estimated cents per hour cost of each.

9. The following information relative to any pension plan:

   a. Active pension plan participants categorized by age, seniority and credited service (vesting and benefit).

   b. Retired participants categorized by date of retirement, age, credited service at retirement, amount and type of monthly benefit.

   c. Annual company contributions to the pension plan with schedule of dates and level of contributions.

d. The three most recent actuarial evaluations.

e. The three latest Department of Labor 5500 forms, including Schedule B and SSA.

f. The three latest trustee reports. If the plan is carried by an insurance company, then the latest three annual reports from the insurance company.

g. A statement indicating any major changes in fund accounting procedures or assumptions which have occurred in the past three years.

h. A current employee handbook, including rules, regulations, penalties, etc.

10. A current employee handbook, including rules, regulations, penalties, etc.

11. A current company policy manual.

12. A list of all temporary and/or probationary workers currently employed by your company.

13. A detailed list of all work that is currently being subcontracted by any temporary service, and any work that may be subcontracted in the next 12 month period, including the name and address of whom the work is contracted to.

It is well established that, with the exception of the employees' social security numbers requested in paragraph 1, the financial information and the information on competitors requested in paragraphs 4-7, and the information regarding non-unit temporary employees and subcontracting requested in paragraphs 12 and 13, all of the foregoing information is presumptively relevant for purposes of collective

bargaining and must be furnished on request.[1]

Accordingly, we grant the General Counsel's Motion for Summary Judgment and will order the Respondent to bargain and to furnish the requested information with the exception of the information mentioned above in paragraphs 1, 4-7, 12 and 13. We deny summary judgment with respect to the information mentioned above in paragraphs 1, 4-7, 12 and 13.

On the entire record, the Board makes the following

FINDINGS OF FACT

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[1] See *Dexter Fastener Technologies*, 321 NLRB 612 (1996), and cases cited therein.

I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in Taylor, Michigan, has been engaged in the wholesale sale of used automobiles to dealers. During the year ending December 31, 1996, the Respondent, in conducting its business operations described above, derived gross revenues in excess of $1 million and shipped goods valued in excess of $50,000 from its Taylor facilities directly to points located outside the State of Michigan. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and

that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held August 11, 1995, the Union was certified on January 14, 1997, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time lot drivers, service truck drivers, condition report writers, check-in employees, sales lineup coordinators, detailers, car washers, buffers, cleaning persons, recon lot drivers, washer/dryer janitors, mechanics, metal technicians, paint technicians, bodyshop clerks, porters, parts clerks, trim technicians, pick-

> up and delivery drivers, fleet/lease condition report writers, fleet/lease lot drivers and crew chiefs employed by the Employer at or out of its facilities located at 20225 Eureka Road and 20911 Gladwin, Taylor, Michigan; but excluding all pick-up and delivery clerks, fleet/lease clerks, accounting management clerks, quality control employees, temporary employees, guards and supervisors as defined in the Act, and all other employees.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

About January 21, 1997, the Union requested the Respondent to bargain and to furnish information and, since about the same date, the Respondent has failed and refused. We find that this failure

and refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after January 21, 1997, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union necessary and relevant information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the

Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We shall also order the Respondent to furnish the Union the information requested with the exception of employees' social security numbers, financial information, information on competitors, and information regarding non-unit temporary employees and subcontracting.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning

the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962) enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964) enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Detroit Auto Auctions, Inc., Taylor, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers

of America (UAW), AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the union employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time lot drivers, service truck drivers, condition report writers, check-in employees, sales lineup coordinators, detailers, car washers, buffers, cleaning persons, recon lot drivers, washer/dryer janitors, mechanics, metal technicians, paint technicians, bodyshop clerks, porters, parts clerks, trim technicians, pick-up and delivery drivers, fleet/lease condition report writers, fleet/lease lot drivers and crew chiefs employed by the Employer at or out of its facilities located at 20225 Eureka Road and 20911 Gladwin, Taylor, Michigan; but excluding all pick-up and delivery clerks, fleet/lease clerks, accounting management clerks, quality control employees, temporary employees, guards and supervisors as defined in the Act, and all other employees.

(b) Furnish the Union the information that it requested on January 21, 1997, with the exception of employees' social security numbers, financial information, information on competitors, and information regarding non-unit temporary employees and subcontracting.

(c) Within 14 days after service by the Region, post at its facility in Taylor, Michigan, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 7 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where

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[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 18, 1997.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington D.C. October 31, 1997

William B. Gould IV, Chairman

Sarah M. Fox, Member

John E. Higgins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive

bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time lot drivers, service truck drivers, condition report writers, check-in employees, sales lineup coordinators, detailers, car washers, buffers, cleaning persons, recon lot drivers, washer/dryer janitors, mechanics, metal technicians, paint technicians, bodyshop clerks, porters, parts clerks, trim technicians, pick-

up and delivery drivers, fleet/lease condition report writers, fleet/lease lot drivers and crew chiefs employed by us at or out of our facilities located at 20225 Eureka Road and 20911 Gladwin, Taylor, Michigan; but excluding all pick-up and delivery clerks, fleet/lease clerks, accounting management clerks, quality control employees, temporary employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL furnish the Union the information it requested on January 21, 1997, with the exception of employees' social security numbers, financial information and information on competitors, and information regarding nonunit temporary employees and subcontracting.

DETROIT AUTO AUCTION, INC.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

DETROIT AUTO AUCTION, INC.,	)	
Employer,	)	
and	)	Case No. 7-RC-20648
INTERNATIONAL UNION UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO,	)	
Petitioner.	)	

HEARING OFFICER'S REPORT AND
RECOMMENDATIONS ON OBJECTIONS

Upon a petition filed in the above-captioned matter on June 30, 1995, and pursuant to a Stipulated Election Agreement approved by the Regional Director of the Seventh Region of the

National Labor Relations Board on July 25, 1995, an election by secret ballot was conducted on August 11, 1995, among the employees of the Employer in the following collective bargaining unit:

> All full-time and regular part-time lot drivers, service truck drivers, condition report writers, check-in employees, sales lineup coordinators, detailers, car washers, buffers, cleaning persons, recon lot drivers, washer/dryer janitors, mechanics, metal technicians, paint technicians, bodyshop clerks, porters, parts clerks, trim technicians, pick-up and delivery drivers, fleet/lease condition report writers, fleet/lease lot drivers and crew chiefs employed by the Employer at or out of its facilities located at 20225 Eureka Road and 20911 Gladwin, Taylor, Michigan; but excluding all pick-up and delivery clerks, fleet/lease clerks, accounting management clerks, quality control

employees, temporary employees, guards and supervisors as defined in the Act, and all other employees.

The payroll period for eligibility purposes was the weekly period ending Friday, July 14, 1995.

Upon the conclusion of the election, a copy of the Tally of Ballots showing the following results, was made immediately available to each of the parties in accordance with the current Rules and Regulations of the Board:

Approximate number of eligible voters	150
Number of void ballots	0
Number of votes cast for Petitioner	79
Number of votes cast against participating labor organization	45

Number of valid votes counted 124

Number of challenged ballots 11

Number of valid votes counted plus challenged ballots 135

The number of challenged ballots were insufficient to affect the outcome of the election.

On August 18, 1995, the Employer timely filed objections to the election, a copy of which was served on the Petitioner in accordance with the Board's Rules and Regulations. The objections state, verbatim, as follows:

A. Employees were threatened and otherwise coerced with, among other things, loss of jobs or other economic

disadvantage, if they did not vote for the Union.

B. Employees' physical safety, as well as the safety of their families, was threatened if they did not vote for the Union.

C. Loud, prolonged conversations and electioneering took place in the voting line, and the Board Agents responsible for the conduct of the election did not act to stop this prohibited activity when brought to their attention.

D. The Union made misrepresentations, promises and granted benefits in exchange for employee support.

E. Employee property was destroyed and/or damaged in retaliation for not supporting the Union during the campaign.

F. Throughout the election campaign period, the Union engaged in threatening and coercive conduct which undermined the laboratory conditions which were to exist for the representation election.

G. The aforementioned, together with other conduct, created a threatening and coercive atmosphere, disrupted the election and undermined the laboratory conditions.

Based upon a preliminary investigation of the Objections, the Regional Director concluded that they

raised substantial and material factual issues, including credibility resolutions, which could best be resolved at a hearing. Accordingly, on September 6, 1995, the Regional Director issued a Notice of hearing on Objections. Thereafter, on September 18, 19 and 22, 1995, a hearing was held before the undersigned hearing officer.

The hearing was conducted in accordance with the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended. All parties were represented and afforded full opportunity to be heard, to present and examine witnesses, to introduce relevant evidence and to make oral

argument at the close of the hearing. Based upon the entire record herein, including my observation and evaluation of the demeanor of the witnesses.[1] I make the following findings of fact, conclusions of law and recommendations:[2]

BACKGROUND

Detroit Auto Auction (hereinafter the Employer or DAA), is primarily

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[1] Most findings of fact herein do not involve the resolution of directly conflicting testimony and all witnesses have been credited unless otherwise noted.

[2] On November 22, 1995, the Employer submitted a Motion to Correct Hearing Transcript. As I have received no objection from the Petitioner regarding the Motion to Correct and as the corrections conform with my recollection of the testimony, it will be recommended that the unopposed Motion to Correct the Hearing Transcript be granted.

engaged in the business of remarketing, via auction, new and used automobiles for major car manufacturers, automobile dealerships and car rental companies from its facilities located in Taylor, Michigan. Most of its automobile auctions are for brokers and dealers only and are closed to the general public. Located on the Gladwin property are the administrative offices, with attached sale (or auction) lanes, the reconditioning building and the condition report writing building. Located on the adjacent Eureka Road property is the building where body work is performed, plus the marshaling or storage yard. Out of the approximately 150 employees in the

unit, there are about 70 drivers, 30-35 recon/detailing employees, 30 point and body shop employees, 10 condition report writer (CRW) employees, 4 mechanics and 2-3 parts installers. The Employer's management staff at the time of the hearing were as follows:

General Manager	Bob Lalain
Assistant General Manager	Garlin Nichols
Recon Manager	Fred Montero
Maintenance Manager	Thomas Hull
Fleet & Lease Manager	James Hart
Security Supervisor	Dave Bevenuto

The election was held in Lane 7 of the sales arena in the Administrative

Building from 7:30 AM to 9:00 AM and 3:30 PM to 4:30 PM on Friday, August 11, 1995.

THE AGENCY STATUS OF THE VOLUNTEER ORGANIZING COMMITTEE AND GORDON SEYLER AND REGINALD HOLLIS

The Employer contends that certain conduct, discussed more specifically in Objections "A," "B" and "F," was engaged in by employees Gordon Seyler and Reginald Hollis. From the testimony it is clear that both Seyler and Hollis, along with other employees, were members of the Volunteer Organizing Committee (VOC). As such they attended meetings, characterized as "small meetings" by Organizer Elida Reyes, with other members of the VOC, as well as other meetings ("large meetings") held for the entire

bargaining unit. Seyler and Hollis passed out literature in the recon building and answered employees' questions about the union organizing drive or the upcoming election. There was no evidence presented that the VOC was the employees only contact with the Petitioner or the sole source of information about the Petitioner. Organizer Reyes appeared at organizational meetings as the representative of the Petitioner, answered employee questions and was available to the employees by telephone if they had any concerns. The evidence does not establish Organizer Reyes conferred any apparent authority on

Seyler or Hollis or, in fact, on any VOC member. The evidence also fails to establish that VOC members held themselves out as representatives of the Petitioner, or that by their conduct during the election campaign they were perceived as agents of the Petitioner.

Employee members of an in-plant organizing committee are not, simply by virtue of such membership, agents of the Union. It is clear that Seyler and Hollis as well the other members of the VOC were active in their support of the Petitioner, and spoke out to other employees in support of the Petitioner. As organizing committee members, these employees were to relay information with

respect to Petitioner meetings, to encourage employees to attend these meetings and to distribute campaign materials on behalf of the Petitioner.

The evidence does not support the conclusion that the activities of Seyler and Hollis or any VOC member constituted the broad manifestation of authority necessary to make them agents of the Petitioner. Rather, their activities were those of enthusiastic union supporters and members of the organizing committee. *Advanced Products Corporation*, 304 NLRB 436 (1991); *United Builders Supply Co.*, 287 NLRB 1364 (1988); *Bristol Textile Co.*, 277 NLRB 1637 (1986); *Baja's Place*, 268 NLRB 868

(1984); *Beard-Poulan Division, Emerson Electric Company*, 247 NLRB 1365 (1980). Nor was there any evidence disclosed that would support a conclusion that the Petitioner held Seyler or Hollis out to be its agents or that the Petitioners instigated, solicited, authorized or ratified any conduct by them. *Kux Manufacturing Co.*, 291 NLRB No. 60; enf'd 890 F.2d 804 (CA 6) (1989).

Based upon the record evidence, I find that the pro-Petitioner conduct and activities of Seyler and Hollis do not establish that they were acting as agents of the Petitioner and any conduct ascribed to them will be evaluated under the third party conduct standard. I

further find that the testimony of the pro-Petitioner conduct and activities by any VOC member is insufficient to establish that they were acting as agents of the Petitioner and any conduct ascribed to other VOC members will be evaluated under the third party conduct standard.

THE OBJECTIONS

OBJECTION "A": Employees were threatened and otherwise coerced with, among other things, loss of jobs or other economic disadvantage, if they did not vote for the Union.

In support of this objection the Employer presented the testimony of employee Evelyn Conrad, a detailer at DAA. Ms Conrad stated that in June, 1995, during the course of the work day,

co-worker Gordon Seyler asked her what she was going to do with all her time off and when she asked what he meant, Mr. Seyler replied when she retired. Ms. Conrad testified that she linked these comments to the Union organizing campaign, even though Mr. Seyler made no mention of the Union during his conversation. While Union organizer Elida Reyes' testimony and home visit sheet indicate that Ms. Conrad had mentioned her intention to retire at the end of the summer, Ms. Conrad's testimony was that she had not discussed retirement with anyone and that while she had been asked by co-workers about retirement, she "did not say the exact date she was going

to retire because she had not decided that date herself."

Given Ms. Conrad's version of the conversation,[3] I am unable to conclude

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[3] From my observation of the witnesses during testimony, including their general demeanor, I would credit Ms. Reyes over Ms. Conrad regarding the discussion of retirement at the June 4, 1995 home visit. Ms. Reyes' testimony was straightforward and she appeared to have no difficulty in recalling the events in question. Additionally, I conclude that there would be no reasonable advantage to Ms. Reyes to fabricate a discussion of Ms. Conrad's possible retirement. The testimony is uncontradicted that Ms. Reyes related her understanding of Ms. Conrad's intent to members of the VOC, including Mr. Seyler. Mr. Seyler denies asking Ms. Conrad about her plans for retirement. In this instance, where Mr. Seyler's testimony differs from that of Ms. Conrad, I credit Ms. Conrad. I find that it is not necessary to rely on these credibility resolutions in reaching my recommendation on Objection "A." However, it is not my intent to discredit all of Mr. Seyler's

(continued...)

that Mr. Seyler asking Ms. Conrad what plans she had for retirement is any type of threat or coercion, under the broadest of definitions. No mention of the union occurred during this conversation, which appears, from the testimony, to have lasted less than one minute. There was-

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(...continued)
testimony, as he was generally a credible witness. He testified in a straight-forward and forthright manner and he seemed to have no difficulty in recalling various events. It is the opinion of this hearing officer that while Mr. Seyler testified that he had not questioned Ms. Conrad about retirement, it is more likely that he did not recall doing so, as it appears that the "questioning" was more in the light of a passing comment, rather than a lengthy or involved conversation. It is not unusual - and indeed, common - for a trier of fact to believe some, but not all, of a witnesses testimony. *Farmer Bros. Co.*, 303 NLRB 638; 649 (1991); *Caffe Giovanni, Inc. d/b/a Giovanni's* 259 NLRB 233, 236 fn7 (1981).

no testimony from Ms. Conrad that Mr. Seyler uttered anything that was or could be reasonably construed as threatening or coercive, but rather it was a passing question from one co-worker to another asked in light of the information given to Ms. Reyes during the home visit.

However, if it is concluded that Mr. Seyler's statement on its face was objectionable, I would apply the Board's third party conduct standards. I am unable to conclude that the conduct alleged in this objection was so disruptive or created an atmosphere of confusion, fear, or coercion sufficient to render impossible the rational, uncoerced expression of choice by voters.

Westwood Horizons Hotel, 270 NLRB 802 (1984); *Diamond State Poultry Co., Inc.*, 107 NLRB 3 (1953). Accordingly, it will be recommended that Objection "A" be overruled.

OBJECTION "B": Employees' physical safety, as well as the safety of their families, was threatened if they did not vote for the Union.

(1) The telephone call to Shannon Hull.

Shannon Hull,[4] a detailer of DAA, testified that she received a telephone call on July 21, 1995, about 8:00 PM at her home, in which a deep male voice told her that "if she valued Devon's life, she can vote yes or vote no." Devon is the

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[4] Ms. Hull is married to DAA maintenance supervisor Thomas Hull.

Hull's son. Ms. Hull testified that she was unable to identify the caller from his voice. While any parent is understandably concerned about a threat, either real or perceived, to their child, Ms. Hull's own testimony does not establish the intent of the caller's attempt to influence her vote. There is nothing in the testimony, other than Ms. Hull's assumptions that, because she was married to a manager of DAA, other employees would assume she would be a no vote, to link the telephone call to those who supported the union, rather than to those who did not.

(2) The telephone call to Nathalie Sypes.

Nathalie Sypes, a condition report writer at DAA, testified that on August 4, 1995, she wrote the word no on the vehicle she drove on the DAA property while performing her job duties. That evening she received a telephone call from an unidentified male, who told her that "if she wrote no again, she won't be able to write." Ms. Sypes also testified that she had been instructed by a member of DAA management, to remove the writing from her vehicle prior to turning it in to the reconditioning department, as employees had complained to management about having to do extra work to clean off the writing. Ms. Sypes testified that she removed the writing as

instructed prior to turning the vehicle in for cleaning, and concluded that the telephone call was the result of her failure to support the Petitioner.

In Ms. Hull's situation, it is unclear from the content of the conversation whether the yes vote or the no vote would endanger her son. In Ms. Sypes' situation, the caller may have been complaining about the dirty window, rather than the sentiment expressed. In any event, the testimony offered in support of these incidents is insufficient to conclude that these telephone calls were placed by agents of the Petitioner. In viewing these telephone conversations under the third

party conduct standard, I am unconvinced that these conversations had been so disruptive or created an atmosphere of confusion, fear or coercion sufficient to render impossible the rational, uncoerced expression of choice by voters. *Westwood Horizons Hotel, supra; Diamond State Poultry Co., Inc., supra.* Accordingly, it will be recommended that this portion of Objection "B" be overruled.

(3) The conversation between Evelyn Conrad and Gordon Seyler.

On July 21, 1995, employee Reginald Hollis distributed a union newsletter to employees in the reconditioning building. The distribution is more fully described below under Objection "F." Employee Evelyn Conrad testified that the

literature contained a picture which was labeled non-union worker and depicted a person with an iron collar and a big chain. Ms. Conrad indicated that she thought this picture was harassment to the non-union worker as it looked like it represented slaves. Ms. Conrad stated that she confronted Mr. Seyler about the picture, that she thought it was harassment. Mr. Seyler responded by asking if Reggie had given her the flyer and telling her that she had no business picking up the flyer. Ms. Conrad testified that as she turned to leave, Mr. Seyler asked "how she would like some big bad union guy [to] put a bomb in your purse or better still put something in

there to get fired for going out the gate." No other employees heard this statement. Ms. Conrad testified that she told about 6 to 7 co-workers about Mr. Seyler's statement. Ms. Conrad also testified that this statement caused her to think that someone, maybe Mr. Seyler or someone from the Union, had put something in her shopping buggy at K-Mart, when about one week after her conversation with Mr. Seyler, the alarm went off when she attempted to leave the store. Ms. Conrad testified that she did not see anyone that she knew while shopping and that she was told that the clerk had failed to remove a security tag from one of her purchases. Ms. Conrad

admitted that when she brought Mr. Seyler's statement to the attention of Elida Reyes, UAW Organizer, Ms. Reyes assured her that threats were forbidden and not tolerated.

Gordon Seyler testified that Ms. Conrad had come to him on July 21, 1995 and complained that Mr. Seyler was harassing her, as she felt that newsletter contained a cartoon which was a caricature of her with chains about the neck of the character. Mr. Seyler testified that he told Ms. Conrad that the cartoon had been used in many organizing campaigns and was not intended to be her. Mr. Hollis also testified that Ms. Conrad indicated to him that she

believed the cartoon in the newsletter was a depiction of herself.

Mr. Seyler testified that Paul James had been terminated during the organizing campaign for attempting to take radio equipment from the Employer's premises and it was his opinion that Mr. James had been set up to be terminated, i.e., the equipment had been placed in a bag that Mr. James used to carry personal belongings in and out of the Employer's facility. As a result of Mr. James' termination, Mr. Seyler testified that he advised "many" employees, not to carry bags in and out of the workplace, as it would be harder to set someone up if they had nothing to place the Employer's

property in.[5] Mr. Seyler specifically admitted to telling Ms. Conrad that it wouldn't be a good idea to leave her purse laying around, somebody could put something in it. Mr. Seyler specifically denied threatening Ms. Conrad in any manner, including by telling her that he or someone from the Union would put something or a bomb in her purse, because of her union activity or feelings toward the union. Ms. Conrad admitted that Mr. James had been terminated for stealing and that the general understanding and/or

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[5] Paul Conrad, nephew by marriage to Evelyn Conrad, confirming that he heard Mr. Seyler tell other employees in the reconditioning area to check their things over, to be sure the same thing that happened to Mr. James did not happen to them.

feeling of the employees at the facility was that the material Mr. James had been accused of stealing had been "planted" in his belongings.

In those instances described above where the recollection of Ms. Conrad differs from that of Mr. Seyler and Mr. Hollis, I credit Mr. Seyler and Mr. Hollis. Both testified in a straightforward and forthright manner. Ms. Conrad appeared uncomfortable on the stand and testified in a less forthright and more rehearsed manner. I feel that her description of the incident at K-Mart was unnecessary embellishment, rather than any actual concern relating to the organizing campaign. Additionally, Mr.

Seyler's explanation of what he said and why he made the statement to Ms. Conrad, as supported by Paul Conrad, is a more reasonable explanation of the conversation.

Even crediting Ms. Conrad's version of the events, I am unconvinced that this conversation was so disruptive or created an atmosphere of confusion, fear or coercion sufficient to render impossible the rational, uncoerced expression of choice by voters. *Westwood Horizons Hotel, supra; Diamond State Poultry Co., Inc., supra.* Accordingly, it will be recommended that this portion of Objection "B" be overruled.

It should be noted that any discussion of the alleged threats testified to in support of Objection "B" was limited to less than 10 employees in the reconditioning building. It should also be noted there was a good voter turnout and the closeness of the Tally must be considered in evaluating whether the threats reasonably could have prevented the free expression of choice by the voters. *Smithers Tire & Automotive Testing of Texas, Inc.*, 308 NLRB 72 (1992); *RJR Archer, Inc.*, 274 NLRB 335 (1985). Furthermore, there was no evidence presented that the alleged threats, even if made, were accompanied by acts of property damage. *Pony Express*

Courier Corporation, 282 NLRB 265 (1986); *Sub-Zero Freezer Company, Inc.*, 271 NLRB 47 (1984).

In considering the statements that comprise the allegations of Objection "B," individually or cumulatively, based on the foregoing, it will be recommended that Objection "B" be overruled in its entirety.

OBJECTION "C": Loud, prolonged conversations and electioneering took place in the voting line, and the Board Agents responsible for the conduct of the election did not act to stop this prohibited activity when brought to their attention.

As noted above, the election was conducted over two polling sessions, from 7:30 AM to 9:00 AM and from 3:30 PM to 4:30 PM. There was a great deal of

testimony from various witnesses regarding the polling location. The election took place in the east end of Lane 7 of the sales arena, which is attached to and part of, the Administration building on the Employer's Gladwin Road property. The remainder of Lane 7 is utilized as an employee break area and was so utilized on the day of the election. This break area could be entered without going through the polling area. There is a wall between lane 7 and lane 6, but there is a large opening at the east end, such that someone could stand at the Administration offices and see straight through to the polling location in Lane 7. The voting line

began in Lane 7 and at times extended through the opening into Lane 6.

Employees Tammy Pfieffer and Donald Raply testified, without contradiction, that the employees in the voting line at the morning session engaged in continuous, loud talking while waiting to cast their ballots. Both Pfieffer and Raply testified that they were unable to distinguish any specific statements or conversation, just that it was loud. Despite the testimony that some of these employees may have been wearing pro-Petitioner apparel and/or were electioneering or otherwise improper in nature. There has never been a rule requiring absolute silence among voters

waiting to vote. *Dumas Bros. Mfg. Co.*, 205 NLRB 919, 929 (1973). In *Purnell Pride, Inc.*, 265 NLRB 1190, 1192 (1982), as in the instant case, there was no evidence concerning the content of the conversations or that the employees involved in the conversations were agents of the union. Mere conversations between voters who are not representatives of any party do not *per se* warrant setting aside the election under the Board's Rule in *Milchem, Inc.*, 170 NLRB 362 (1968). Such conduct by rank and file employees is insufficient to warrant setting aside the election. *Masoneilan International, Inc.*, 223 NLRB 965 (1976); *Dumas Bros. Mfg. Co., supra.*

The afternoon pre-election conference was scheduled for about 3:00 PM. The polls were open from 3:30 PM to 4:30 PM. While the testimony of the witnesses is contradictory regarding the timing of events, the following facts are clear. At least one time, and possibly twice, 5 or 6 employees left the Lane 7 break area. They stood in Lane 6 for a period of time of less than one minute, clapping and chanting. The chanting may have included the words union yes or go union. They left the area when instructed to do so by the Board agent conducting the election.

While each party makes much of the timing of the employee actions described

above, I find that it makes little difference if their actions occurred prior to the opening of the polls, after the opening of the polls, or both. Cheering outside the polling area for a period of one minute or less, whether it occurred before or during the polling time is not of such a serious nature that voters would find it impossible to freely cast their ballots. *Northern Telecom, Inc.*, 250 NLRB 564, 568 (1980); *Southeastern Mills, Inc.*, 227 NLRB 57, 58 (1976). There was no evidence presented that any employee was in the polling area when the chanting occurred. The chanting was not voiced by one of the parties but by a group of employees; it was conducted

for two or less brief periods; it was conducted in an area outside the polling area; it was not directed at employees waiting in line to vote; it was not directed at employees on a one-to-one basis; and it could not be understood inside the polling area.[6] *Amalgamated Services and Allied Industries Joint Board (ACTWU) v. NLRB (Angelica Healthcare Services Group, Inc.)*, 815 F.2d 225, 231; 125 LRRM 2832; 2837 (CA 2) (1987); citing both *Northern Telecom and Southeastern Mills supra*. The Board has refused to set aside elections based upon

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[6] There was no testimony presented that the chanting could be heard inside the polling area if it occurred after the opening of the polls.

employees making pro-union statements in the course of voting. *Southeastern Mills supra; Intertype Company, a Division of Harris Intertype Corporation,* 164 NLRB 770 (1967). Accordingly, it will be recommended that Objection "C" be overruled.

OBJECTION "D": The Union made misrepresentations, promises and granted benefits in exchange for employee support.

The Employer relies on, as support for its position on this objection, three "coupons" distributed by the Petitioner during its campaign. Coupon 1 states "I promise and guarantee that you will not go on strike if 2/3 of the workers at Detroit Auto Auction vote not to strike. NO ONE FROM THE UAW WILL FORCE YOU TO

STRIKE." Coupon 2 states "I promise and guarantee that if a majority of the workers vote to strike (2/3) you will receive $150.00 a week from the strike fund. Whether or not you've ever paid dues." Coupon 3 states "I promise and guarantee to give you permission, if requested, to cross the union picket line and continue to work while other union members are on strike without being subjected to pressure, intimidation or union fines." Each of the three coupons are photocopied onto a separate piece of paper and contain a statement which states "To all employees: To protect yourself against false promises by some union bosses and "union pushers" we

suggest you get certain promises guaranteed in writing. Ask the union boss or union pusher to sign and date each of the enclosed union guarantee certificates. Have it notarized to be protected. All three of these coupons are signed by Organizer Elida Reyes, dated August 7, 1995 and notarized by Barbara J. S_____ (about whose name there was no testimony and is unclear to this writer). There was no testimony presented about these coupons, including who authorized them, and the Employer, in its closing statement, contends they speak for themselves.

As far back as *Corn Products Refining Company*, 58 NLRB 1441, 1442

(1944), where it was stated that employees undoubtedly recognize [campaign] propaganda for what it is, and discount it and *Carrollton Furniture Manufacturing Co.*, 75 NLRB 710, 712 (1948) where the Board entrusted these [campaign] matters to the good sense of the voters, the Board has been reluctant to overturn elections based on a parties' campaign propaganda. There is nothing in the record to suggest that the employees could not recognize the campaign propaganda for what it was. The proper standard to evaluate the Petitioner's coupons is that which is set forth in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), where the Board held

that it would no longer probe into the truth or falsity of the parties' campaign statements and will not set aside elections on the basis of misleading campaign statements.

I am unable to conclude, based on the evidence presented, that the Petitioner's campaign coupons violate the standards set forth in *Midland supra*. Accordingly, it will be recommended that Objection "E" be overruled.

OBJECTION "E": Employee property was destroyed and/or damaged in retaliation for not supporting the Union during the campaign.

The Employer withdrew Objection "E" during the course of the hearing (TR. 504) and put forward no affirmative evidence in support of this Objection.

Accordingly, it will be recommended that the withdrawal of Objection "E" be approved.

OBJECTION "F": Throughout the election campaign the Union engaged in threatening and coercive conduct which undermined the laboratory conditions which were to exist for the representation election.

The Employer offered the testimony of employee Evelyn Conrad in support of this objection. Ms. Conrad testified that she was involved in several incidents with employee Reginald Hollis during the election campaign. As noted above, Mr. Hollis was an active union supporter and a member of the VOC. On an unspecified date, Ms. Conrad testified that Mr. Hollis approached Mr. Seyler and herself at Seyler and Conrad's work area.

Ms. Conrad testified that Mr. Hollis informed Mr. Seyler that he had better get back to work as Evelyn had told the boss he wasn't doing any work that day. When Ms. Conrad said that she had not done this, Mr. Hollis replied that he was just trying to get her blood boiling.

Ms. Conrad testified further that at about 4:30 AM on July 21, 1995, Mr. Hollis had brought flyers and badges (with the statement "Bring Paul Back" on them) into the breakroom in the reconditioning building. Ms. Conrad testified that Mr. Hollis handed everyone in the breakroom but herself a badge and

a flyer.[7] Ms. Conrad indicated that she picked up a flyer from breakroom table after the other employees left the breakroom.[8]

Ms. Conrad testified that later that same morning, Mr. Hollis approached her work area to talk to co-worker Peter Wolte and remarked to Wolte, lets get away from this car, as he (Hollis) did not want to talk around her (Conrad). As

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[7] Ms. Conrad was only able to identify one employee, Norm Hursey, as being among many employees in the breakroom prior to the start of the shift on the day in question. Mr. Hursey who testified on other matters, was not questioned about the incident between Mr. Hollis and Ms. Conrad on July 21, 1995.

[8] Ms. Conrad's conversation with Mr. Seyler regarding the distribution and content of the July 21, 1995 flyer is discussed about in Objection "B."

a result of this remark and the subsequent discussion between Ms. Conrad and Mr. Hollis regarding same, they met with Supervisor Fred Montero, who instructed them to apologize to each other and return to work. In the course of this meeting, Ms. Conrad states that Mr. Hollis indicated that she had no business reading the union literature.

Under cross examination, Ms. Conrad testified that she called Organizer Elida Reyes to complain about Mr. Hollis' failure to hand her a copy of the July 21, 1995 flyer and that Ms. Reyes assured her that she was entitled to receive all flyers and that Mr. Reyes would instruct both Mr. Seyler and Mr. Hollis to make

sure she received the flyers. Ms. Conrad testified that she received all subsequent flyers.

The testimony failed to establish that Mr. Hollis was acting in accordance with the Petitioner's instructions regarding the distribution of literature. *Kux Manufacturing Co., supra.* The testimony also failed to establish that Mr. Hollis was an agent of the Petitioner, as set forth above. In evaluating the above conversations under the Board's third party conduct standards, I am unable to conclude that the conduct alleged in this objection was so disruptive or created an atmosphere of confusion, fear or coercion sufficient to

render impossible the rational, uncoerced expression of choice by voters. *Westwood Horizons Hotel*, 270 NLRB 802 (1984); *Diamond State Poultry Co., Inc.*, 107 NLRB 3 (1953). Accordingly, it will be recommended that Objection "F" be overruled.

OBJECTION "G": The aforementioned, together with other conduct, created a threatening and coercive atmosphere, disrupted the election and undermined the laboratory conditions.

This objection is conclusionary in nature and no evidence was presented unique to and in support of this objection. Accordingly, it will be recommended that Objection "G" be overruled.

RECOMMENDATIONS

The undersigned recommends that the Motion to Correct the Hearing Transcript be granted.

I have considered the Employer's objections individually and cumulatively. Based on the foregoing and the record evidence as a whole, the undersigned recommends that the request by the Employer to withdraw Objection "E" be approved and the remaining objections be overruled in their entirety and that a Certification of Representative issue.

PLEASE TAKE NOTICE that the post-report procedures set forth in the Regional Direction's Notice of Hearing on Objections in this case now become

effective. Further, under the provision of Section 102.69 of the Board's Rules and Regulations, exceptions to this report must be filed with the Board in Washington, D.C. by April 25, 1996, in order to be timely filed, absent requests for extensions of time, properly made and granted. If no exceptions are filed, the Board may adopt the recommendations set forth herein without further consideration thereof or make any other disposition of the case.

Dated at Detroit, Michigan, this 11th day of April, 1996.

/s/ Vicki Claire Lessard

Vicki Claire Lessard,
Hearing Officer
National Labor Relations Board
Seventh Region, Room 300,
Patrick V. McNamara
Federal Building
477 Michigan Avenue
Detroit, Michigan 48226-2569

I promise and guarantee that you will not go on strike if 2/3 of the workers at Detroit Auto Auction vote not to strike. NO ONE FROM THE UAW WILL FORCE YOU TO STRIKE.

Signed and Guaranteed By _____ (Union Organizer)

Notarized By _____

Date 8-7-95

TO ALL EMPLOYEES:

TO PROTECT YOURSELF AGAINST FALSE PROMISES BY SOME UNION BOSSES AND "UNION PUSHERS," WE SUGGEST YOU GET CERTAIN UNION PROMISES GUARANTEED IN WRITING. ASK THE UNION BOSS OR UNION PUSHER TO SIGN AND DATE EACH OF THE ENCLOSED UNION GUARANTEE CERTIFICATES. HAVE IT NOTARIZED TO BE PROTECTED.

EXHIBIT
E-2

I promise and guarantee that if a majority of the workers vote to strike (2/3) you will receive $150.00 a week from the strike fund. Whether or not you've ever paid dues.

Signed and Guaranteed By _____ (Union Organizer)

Notarized By _____

Date 9-7-95

TO ALL EMPLOYEES:

TO PROTECT YOURSELF AGAINST FALSE PROMISES BY SOME UNION BOSSES AND "UNION PUSHERS," WE SUGGEST YOU GET CERTAIN UNION PROMISES GUARANTEED IN WRITING. ASK THE UNION BOSS OR UNION PUSHER TO SIGN AND DATE EACH OF THE ENCLOSED UNION GUARANTEE CERTIFICATES. HAVE IT NOTARIZED TO BE PROTECTED.

EXHIBIT
E-3
MT 9-11-95

I promise and guarantee to give you permission, if requested, to cross the union picket line and continue to work while other union members are on strike without being subjected to pressure, intimidation or union fines.

Signed and Guaranteed By _____ (Union Organizer)

Notarized By _____

Date 9-7-95

TO ALL EMPLOYEES:

TO PROTECT YOURSELF AGAINST FALSE PROMISES BY SOME UNION BOSSES AND "UNION PUSHERS," WE SUGGEST YOU GET CERTAIN UNION PROMISES GUARANTEED IN WRITING. ASK THE UNION BOSS OR UNION PUSHER TO SIGN AND DATE EACH OF THE ENCLOSED UNION GUARANTEE CERTIFICATES. HAVE IT NOTARIZED TO BE PROTECTED.

UNION CONSTITUTION

ARTICLE 12

Duties of the International Executive Board

Section 13. The International Executive Board shall set up such departments as provided for in this Constitution. It may, if voted by a two-thirds (2/3) vote, create additional departments for promoting the business of this International Union or the welfare of its membership. It may hire professional specialists not members of the International Union for such departments if they are not available within the membership.

ARTICLE 50

Strikes

Section 1. (a) When a dispute exists between an employer and a Local Union concerning the negotiation of a collective bargaining agreement or any other strikeable issue the Local Union or the International Executive Board may issue a call for a strike vote. All members must be given due notice of the vote to be taken and it shall require a two-thirds (2/3) majority vote by secret ballot of those voting to request strike authorization from the International Executive Board. Only members in good standing shall be entitled to vote.

(b) Where a different ratification procedure for a Local Union or an Intra-Corporation Council has been properly applied for under terms of Article 19, Section 3, and after the International Executive Board has approved such ratification procedure, the method for accepting or rejecting contract changes and the taking of strike votes shall be governed by the terms of the procedure approved by the International Executive Board for that Local Union or Intra-Corporation Council.

Section 14. If and when a strike has been approved by the International Executive Board, it shall be the duty of the International Executive Board to

render all financial assistance to the members on strike consistent with the resources and responsibilities of the International Union.